IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/10/2003

CORAM

THE HONOURABLE MR.JUSTICE A.K.RAJAN

Writ Petition No.38269 of 2002

Tvl.Sumangala Steels Limited
45,Charmiers Road
Chennai 28 Petitioner

Versus

1. The Chairman,
Tamil Nadu Sales Tax
Appellate Tribunal, Chennai

2. The Appellate Assistant Commissioner
CT. IV chennai

3. The Deputy Commercial Tax Officer
Mandavali Assessment Circle, chennai
Respondents

Petition filed under Article 226 of the Constitution of India,
praying to issue a writ of certiorarified mandamus, as stated there in.

For Petitioner : Mr.V.Sundaresan for Mr.A.Ravichandran For Respondents :
Special Government Pleader
Respondents 1 to 3.

:ORDER

This writ petition has been filed for the issuance of the writ of
writ of certiorarified mandamus, to call for the records of the first
respondent in T.A.98/2002 dated 06.08.2002, to quash the same as illegal,
unlawful and unconstitutional and direct the second respondent to take the
appeal on file and dispose it of on merits.

2. The brief facts that are necessary for the purpose of disposal
of this writ petition are as follows: (i) The petitioner is doing
business in Iron and steel. It was assessed for taxable turnover of
17,95,64,901 and Rs.4,72,07,862 respectively, by order dated 24.03.2000.

The taxable turnover consists of the following: (i)Inter state sale covered by C-Form 7,46,743.00 (ii)Consignment sales not covered by F-forms 88,25,405.00 (iii)Stock transfer not covered by form-F 3,72,35,714.00

(ii) Subsequently, the petitioner produced F-form declarations for the turnover of Rs.3,72,35,714 relating to inter-branch transfers. That was accepted and the third respondent passed a revised order on 31 .05.2000, confirming the assessment for the balance taxable turnover. The taxable turnover mentioned in the revised order of assessment for a sum of Rs.88,25,405/- was disputed as it does not relate to interstate sales. This turnover represents sale effected in other states through its own commission agents who had tendered sales pattials etc.,. Therefore, this turnover is beyond the purview of taxing provision in the Central Sales Tax Act, 1956.

(iii) The petitioner despatched the goods to their agents in the other states for sale on their behalf. It is the agent who has to pay tax on such sales in the other States. When no interstate sales have been taken place, it is not taxable. Therefore, the petitioner filed an appeal before the second respondent against the impugned order dated 31.05.2000. Second respondent by order dated 14.09.2001 dismissed the appeal holding that the revision was only with respect to a turnover of 3,72,35,714 only and the petitioner had not filed any appeal against the original order of assessment dated 24.03.2000.

(iv) During the pendency of appeal, the petitioner produced counter-foil of form-F declarations to prove that the despatches were only consignment despatches to the agents in the other States. Therefore, it was not interstate sale; the original form-F were lost in transit and therefore the counterfoils containing the details were produced; but that was rejected on the ground that it cannot be considered. Furnishing F-form is only an option to prove the despatches. Such despatches to its own agencies in other states can also be proved otherwise. Therefore, against the order of the second respondent, the petitioner filed an appeal before the first respondent in TA.98/2002 and that was also dismissed holding that the order of respondent dated 31.05.2000 was one under section 55 of TNGST Act, which was involved in seeking rectification of errors and the appeal was dismissed. Revision of any assessment under CST Act may be on the lines of TNGST. Under Section 55 of TNGST Act, any error apparent on the face of the record can be rectified within a period of five years from the date of the order.

(v) In the original order passed on 24.03.2000, there was no error apparent. The F forms for a turnover of Rs.3,72,35,714 representing inter-branch transfers were filed only subsequent to the original assessment order and a revision was made deleting the said turnover. In the same order the impugned turnover of Rs.88,25,405/- is taxed at 8%. The view of the first and second respondent that the revised order was only an order of rectification of the error on the face of the record is not correct. The assessment of tax at the turnover of Rs.88,2 5,406/- is beyond the purview of CST Act. Therefore, it is liable to be set aside and hence the prayer for a writ of certiorari to cancel the appellate authority order and to direct the second respondent to take the appeal on file and dispose it of on merits.

3. In the counter affidavit, it is stated as follows: (i) The petitioner was finally assessed on 24.03.2000 for a taxable turnover of Rs.17,95,64,901/- and Rs.4,72,07,862/- respectively for the year 1997-98 under the CST Act,1956.

(a) Inter-state sales covered in Rs. by C forms
11,46,743.00 @4%
(b)Consignment sales not covered by Form F declaration 88,25,405
@8%

(c.)Stock transfer to Bangalore not covered by Form F declaration
3,72,35,714 @8%

(d) Taxable turnover 4,72,07,862/
==========

(e) Add: Exemption allowed on stock transfer covered by Form F declaration and High Seas Sales 13,23,57,039/

Total turnover determined 17,95,64,901/
==========

(ii) Subsequent to this dealers filed F-declarations relating to the transactions to the tune of Rs.3,72,35,714/-. The respondent allowed the exemption on the said turnover. Therefore, the taxable turnover was re-determined as follows:

Interstate sales covered by c-form 11,46,743 @4%
Consignment form not covered by f-declaration
88,25,405 @8%

Taxable turnover re-determined 99,72,148/

==========

(iii) The second respondent dismissed the appeal filed against this order holding that the revision of the assessment made on 31.05.2000 was only in respect of turnover of Rs.3,72,35,714/-; it also held that the dealers had not filed any appeal against the original assessment dated 24.03.2000. The dealers claim for exemption over the turnover of Rs.88,25,405/- as consignment sales was rightly disallowed as the original assessment became final. Against that order, the petitioners filed second appeal before the Tribunal and the Tribunal also dismissed it, holding that the dealer has not filed any appeal against the original assessment order dated 24.03.2000. The original assessment order except in respect of the turnover over which the claim of exemption had been allowed became final. The dealers cannot be permitted to challenge the original assessment order by filing an appeal against the subsequent order. The

assessment with respect to Rs.88,25,405/- became final on 24.03.2000, against which no appeal was filed. Inasmuch as no appeal having been filed against the original order, an appeal to the second respondent under Sect ion 31 does not lie on the order passed on 30.05.2000.
(iv) The subject matter of the proceedings under Section 55(3) was only against the turnover of Rs.3,72,35,714/- and that alone was the subject matter of revised order against which an appeal could be filed under Section 31. The contention of the petitioner that the order dated 31.05.2000 is not an order passed under Section 55 Tamil Nadu General Sales Tax Act,1959 is to be rejec ted.

4. The learned counsel appearing for the writ petitioner referred to the impugned order dated 30.05.2000 which reads as follows: "To the pre-assessment notice, the dealer stated that the value of stock transfer to Bangalore Branch is only Rs.3,72,35,714.00 and not Rs.4,39,50,878/- mentioned in the pre-assessment notice. The turnover of Rs.62,15,163.00 representing stock transfer is related to Pondicherry Branch. Accordingly, the dealers filed Form F and supporting details for Rs.7,96,31,864.00. Form F declaration and other supporting details proving the movement of stock have been verified and found to be in order. Hence, the claim of exemption on Rs.7,96,31,864.00 towards stock transfer is allowed. However, the dealers had not filed Form-F for Rs.88,25,405.00 representing consignment sale and for Rs.3,72,35,714.00 representing stock transfer to Bangalore Branch in the above circumstances, determine the total and taxable turnover of the dealers for the year 1997-98 at Rs.17,95,64,901.00 and Rs.4,72,07,86 2.00 respectively."

By order dated 31.05.2000, the third respondent passed the order as follows: "The dealers have since filed Form-F for Rs.3,72,35,714.00 towards stock transfer to Bangalore Branch and requested to revise the assessment. The supporting records for proving movement of goods on stock transfer to Bangalore were already verified. The Form F declaration now filed are in order and hence exemption on stock transfer value of Rs.3,72,35,714.00 to Bangalore Branch is allowed.

Accordingly, I revise the assessment of the dealers for the year 199 7-98 under Section 9(2) of CST Act read with section 55 of the TNGST Act and re-determine their total and taxable turnover of the dealers for the year 1997-98 at Rs.17,95,64,901.00 and Rs.99,72,148/- respectively taxable."

5. The learned counsel appearing for the petitioner submitted that it is a revised order by which the taxable turnover was re-determined under Section 9(2) of the CST Act r/w Section 55 of TNGST Act. Therefore, it is the revised order of the original assessment order. When the order is revised, it merges with the original order and an appeal can be filed against the revision order. Under the circumstances, the non-filing of the appeal against the original order is not detrimental to the petitioner. Therefore, in the appeal against that order when documents were produced to satisfy that Rs.88,25,405/- was sale through its own commission agents and therefore it was not interstate sale and the

appellate authority should have considered that on merits and dispose the appeal. To prove the sales through its own commission agents production of form-F is not mandatory. It is also permissible to prove otherwise than by filing of form-F. Inasmuch as the rectified order merges with the original order, appeal lie against the rectified order.

6. In support of his contention, the learned counsel for the petitioner relied upon a Division Bench decision of this Court in Vedantham Raghaiah Vs. Third Additional Income Tax Officer, City Circle V, Madras (XLIX ITR 314, wherein this court has held that:

"once an order of rectification was passed, the assessment itself was modified and what remained was not the order of rectification but only the assessment is rectified."

7. The learned counsel for the petioner also referred to another Judgment reported in S.Arthanari Vs. First Income Tax Officer, Salem, and another (Vol.83 ITR 828), wherein this Court has held in the 'Head Note' itself that: "assessment is one integrated process the purpose of which is to reckon correctly the tax liability of an assessee and the process is a compartmentalised by statute. The proceeding involving rectification of an assessment is one of the channels through which the purpose of assessment is achieved."

In the body of the Judgment, it has been held that: "the power of rectification is available under Section 35(1). "No doubt it is exercisable within the statutory time prescribed . But, once it is invoked and an order of rectification is made, the order of assessment becomes merged in the order corrected by rectification. The corrected order is then the "statutorily deemed order of assessment" for it would be anomalous to hold that even after correction, a mistaken order ought to prevail. In case whether assessment orders are rectified, the original orders whose mistakes and errors are corrected no longer can hold....."

8. The counsel also referred to another decision in International Cotton Corporation (P) Limited vs. Commercial Tax Officer, Hubli, and others (Volume 35 STC 1975), wherein the Supreme Court has held " After such a rectification, the original assessment order was no longer in force".

9. The counsel referred to another decision in Hind Wire Industries Ltd., Vs. Commissioner of Income Tax (Vol. 212 ITR 639), wherein the Supreme Court has held that: "The reason for that is that once an assessment is reopened, the initial order for assessment ceases to be operative. The effect of reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made on reassessment. The initial order for reassessment cannot be said to survive, even partially, although the justification for reassessment arises because of turnover escaping assessment in a limited field or only with respect to a part of the matter covered by the initial assessment order. The result of reopening the

assessment is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment."

"What is true of the assessment must also be true of reassessment because reassessment is nothing but a fresh assessment. When reassessment is made under section 19, the former assessment is completely reopened and in its place fresh assessment is made. While reassessing a dealer, the assessing authority does not merely assess him on the escaped turnover." Pages 642 and 644 referred to the earlier decision of the Supreme Court and finally held as follows: "In view of these authorities taking the view that a word "any" in the expression "Order sought to be amended" would mean that even the rectified order."

Relying upon this decision, the counsel for the petitioner submitted that since the impugned order dated 30.05.2000 is only the rectification of the order dated 24.03.2000; therefore, the turnover of Rs.88,25,405 can be challenged in appeal.

10. The counsel appearing for the respondent submitted that the assessment order was passed on 24.03.2000; a tax assessed on the basis of C-form at the rate of 4% and consignment sale was taxed at the rate of 8%. Subsequently, the petitioner produced form-F and therefore, the turnover under stock transfer was reduced by Rs.3,72,35,714/-. Therefore, the modified order is not a rectification of assessment order, but only granting exemption on the turnover on the ground that documents produced to prove exemption. Since no appeal was filed against the order of assessment dated 24.03.2000 within 30 days or within the possible extension by another 30 days, the present appeal shall fail.

11. The only point that is to be considered in this writ petition is whether the order dated 30.05.2000, is a revised order of the assessment dated 24.03.2000, or it is only an order granting exemption for certain turnover in the original assessment.

12. This Court in the case of State of Tamil Nadu Vs. P.Hajee Mohammed Saliah and Company (Vol.103 STC 260), held that the order passed by the assessing officer on 12th October,1978 was not an order of rectification of error passed under Section 55 of the Act but a revision granting exemption to the extent of Rs.3,88,621/- on the turnover of local purchase of raw hides and skins, which was the subject matter of the revision made under Section 32 of th e Act by the Commissioner. Therefore, the order passed by the assessing Officer on 12th October, 1978 had to be taken into account while arriving of the timelimit for revision of assessment under Section 32 of the Act.

13. In the order of the third respondent dated 31.05.2000, as extracted above, it is stated that the third respondent □revised□ the assessment of the dealers for the year 1997-98. This order has been passed under Section 9(2) of CST Act read with Section 55 of the TNGST

Act. This order refers that the petitioner were finally assessed for the year 1997-98, for a total and taxable turnover of Rs.17,95,64,901.0 0 and Rs.4,72,07,862.00 respectively under the Act in proceedings cited as below; "The dealers have filed form-F for Rs.3,72,35,714.00 towards stock transfer to Bangalore Branch and requested to revise the assessment. The supporting records for proving movement of goods on stock transfer to Bangalalore were already verified. Form-F declaration now filed are in order and hence exemption on stock transfer value of Rs.3,72,35,714.00 to Bangalore Branch is allowed. Accordingly, I revise the assessment of the dealers."

Though it is termed as □revised□ order in subsistence, it is not a revised order, but it only allowing exemption on production of documents (F-forms) which enable them to get exemption. The original order has been modified granting this exemption. Therefore, it is not a revised order or rectified order of assessment. The impugned order also refers to this aspect clearly. This order passed by the third respondent dated 31.05.2000 was the only order passed under Section 9(2) of CST Act. As seen from the affidavit filed in support of the petitioner, the petitioner during the course of appeal provided counterfoils of form-F declaration for a sum of Rs.88,25,405/-. The order which was modified by the third respondent was only with respect to granting of exemption on production of form-F. It is not an order of revision or reassessment. Had the petitioner produced these counterfoils of form-F, before the original assessment. The petitioner could have insisted on getting exemption. Having failed to file those documents, and having failed to file an appeal against the assessment order dated 24.03.2000, the petitioner cannot get the relief in the appeal filed against the order dated 30.05.2000. It was only granting exemption on certain turnover and not an order of revision. The mere fact that the word "revised" is found in the order passed by the third respondent it does not make it a revisional order.

14. The Judgment relied upon by the petitioner, no doubt applies to a case by revision. Once an assessment is revised, it merges with the original order. But, the question here is whether the order appealed against is a revised assessment order. This fact has been considered by Second respondent as well as by the first respondent. The first respondent has held that: "the merger theory may not be of help to the assessee as the sales turnover as now being disputed was not disturbed and there was no appeal for the same turnover mentioned in the original assessment order dated 24.03.2000. The revision of assessment is in fact rectification done under Section 55 of TNGST Act considering the declaration forms submitted before the Assessing Officer." This finding of the first respondent is correct and it cannot be interfered with.

15. The main contention of the petitioner is the order dated 30.05.2 000 is a reassessment order, but in fact it is not a reassessment, it is only granting exemption on the taxable turnover on proof of documents. The mere nomenclature as "revised" or "reassessment" or " rectification" does not matter; It is the substance of the order that to

be seen. Once the assessment is made by the third respondent, he becomes functus officio. Thereafter, his order can only be modified in appeal. Therefore, the order of the third respondent dated 30.05.2000 which is said to have been passed under Section 9(2) read with Section 55 of TNGST Act is an order passed not under Section 92 but only under Section 55. The third respondent has no power under Section 9(2) of TNGST Act, once he had passed an order for assessment. In this case, inasmuch as an assessment order has already been passed on 24.03.2 000, the third respondent has no power or right or jurisdiction to pass another order dated 30.05.2000. It should have been done only under Section 55 of the TNGST Act. Therefore, mentioning of provisions of Section 9(2) in that order dated 30.05.2000 is not correct and it has to be ignored. Therefore, by the order dated 30.05.2000, only that portion of the turnover which enables for exemption is modified. Therefore, with respect to Rs.88,25,405/-, the original order dated 23 .04.2000 stands. Merely because that is also refereed to in the order of the third respondent, it does not make the order as a reassessment or revision of the assessment. Therefore, the contention of the petitioner is not acceptable.

16. In the result, the writ petition is dismissed. No costs. Consequently, WMP.No.57283 of 2002 is closed.

23.10.2003

To
1. The Chairman, Tamil Nadu Sales Tax Appellate Tribunal, Chennai

2. The Appellate Assistant Commissioner CT. IV chennai

3. The Deputy Commercial Tax Officer Mandavali Assessment Circle, chennai

A.K.RAJAN,J

ksr

□